

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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WESTERN WATERSHEDS PROJECT, *et al.*,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT OF
THE U.S. DEPARTMENT OF THE
INTERIOR, *et al.*,

Defendants.

Case No. 3:21-cv-00103-MMD-CLB

ORDER

I. SUMMARY

Plaintiffs¹ sued Defendants² over their approval of the Thacker Pass Lithium Mine Project (the “Project”), seeking to halt construction of the mine. (ECF No. 1.) The Court previously granted Defendant-Intervenor Lithium Nevada Corporation (“Lithium Nevada”), the proponent of the Project, leave to intervene. (ECF No. 18.) Before the Court is proposed Plaintiff-Intervenors Reno-Sparks Indian Colony and Atsa koodakuh wylh Nuwu/People of Red Mountain’s (collectively, the “Tribes”) motion to intervene.³ (ECF No. 43 (“Intervention Motion”).) While neither Plaintiffs (ECF No. 52) nor Defendants (ECF No. 50) oppose the Intervention Motion, Lithium Nevada does (ECF No. 51).⁴ Because the

¹Plaintiffs are Western Watersheds Project, Great Basin Resource Watch, Basin and Range Watch, and Wildlands Defense. (ECF No. 1 at 1.)

²Defendants are Bureau of Land Management of the U.S. Department of the Interior (“BLM”), the Department of the Interior, and Ester M. McCullough (collectively, “Federal Defendants”). (ECF No. 1 at 1.)

³The Court previously granted the Tribes’ motion to expedite and set an expedited briefing schedule on the motion to intervene. (ECF No. 47.)

⁴The Tribes filed a reply. (ECF No. 54.)

1 Court finds the Tribes' intervention timely, otherwise finds that the Tribes satisfy the factors
 2 governing intervention as of right, and as further explained below, the Court will grant the
 3 Intervention Motion.

4 **II. BACKGROUND**

5 The Court incorporates by reference the background of this case as described in
 6 its recent order denying Plaintiffs' motion for a preliminary injunction and does not recite
 7 that background here. (ECF No. 48 at 2-4.)

8 **III. DISCUSSION**

9 The Tribes seek intervention as of right under Fed. R. Civ. P. 24(a), or in the
 10 alternative, permissive intervention under Fed. R. Civ. P. 24(b). (ECF No. 43 at 2.) The
 11 Court finds that the Tribes have demonstrated entitlement to intervene as of right.

12 Rule 24(a)(2) permits anyone to intervene who "claims an interest relating to the
 13 property or transaction that is the subject of the action, and is so situated that disposing
 14 of the action may as a practical matter impair or impede the movant's ability to protect its
 15 interest, unless existing parties adequately represent that interest." When evaluating
 16 motions to intervene as a matter of right, courts construe Rule 24 liberally in favor of
 17 potential intervenors, focusing on practical considerations rather than technical
 18 distinctions. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001).
 19 A party seeking to intervene as of right must meet four requirements:

20 (1) the applicant must timely move to intervene; (2) the applicant must have
 21 a significantly protectable interest relating to the property or transaction that
 22 is the subject of the action; (3) the applicant must be situated such that the
 23 disposition of the action may impair or impede the party's ability to protect
 that interest; and (4) the applicant's interest must not be adequately
 represented by existing parties.

24 *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citation omitted). An applicant
 25 for intervention bears the burden of showing that all four requirements are met. *See United*
 26 *States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). The Tribes have satisfied
 27 these four factors.
 28

1 **1. Factor 1: Timeliness**

2 “Timeliness is ‘the threshold requirement’ for intervention as of right.” *League of*
 3 *United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.1997) (quoting *United*
 4 *States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990)). “Timeliness is determined by the
 5 totality of the circumstances facing would-be intervenors, with a focus on three primary
 6 factors: ‘(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the
 7 prejudice to other parties; and (3) the reason for and length of the delay.’” *Smith v. Los*
 8 *Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016). The Court addresses below
 9 the parties’ arguments as to each of the three timeliness prongs.

10 **a. Stage of the Proceedings**

11 The Tribes argue they filed their Intervention Motion at an early stage in the
 12 proceedings because they filed the motion just before the Court held a hearing on
 13 Plaintiffs’ motion for a preliminary injunction, which the Court later denied. (ECF No. 43
 14 at 7.) Lithium Nevada counters that the Tribes filed their Intervention Motion at a late
 15 stage in the proceedings because the Intervention Motion did not become fully briefed,
 16 even on an expedited schedule, until after the Court held the hearing on, and denied, the
 17 motion for preliminary injunction. (ECF No. 51 at 6.) Moreover, Lithium Nevada argues,
 18 the existing parties to this case have already negotiated and agreed to a briefing schedule
 19 for dispositive motions in this case. (*Id.*) The Court agrees with the Tribes on this prong.

20 This case is still in its early stages. Per the briefing schedule the parties agreed
 21 to—and the Court approved—Federal Defendants will not even file the administrative
 22 record until the end of this week. (ECF No. 28 at 5.) Dispositive, merits briefing will not
 23 happen until later this year. (*Id.* at 5-6.) And the Court has not yet issued a preliminary
 24 injunction, despite Plaintiffs’ request. (ECF No. 48.) The Court accordingly views this case
 25 as still in its early stages. Moreover, the Tribes are correct that the fact they filed their
 26 Intervention Motion before (albeit right before) the Court held a hearing on Plaintiffs’
 27 preliminary injunction motion tends to weigh in favor of finding the Intervention Motion
 28 timely filed. See *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995)

1 (affirming decision to allow proposed intervenors to intervene as of right and finding their
2 motion to intervene was timely where they “moved to intervene prior to the hearing on the
3 preliminary injunction motion”). This prong weighs in favor of finding the Intervention
4 Motion timely.

5 **b. Prejudice**

6 The Tribes argue that no existing parties will be prejudiced if the Court allows them
7 to intervene because the Court had not ruled on any substantive issues at the time they
8 filed the Intervention Motion, no relief from long-standing inequities will be delayed, and
9 the soonest the Court could grant any party final relief is more than five months away in
10 any event. (ECF No. 43 at 7-8.) Lithium Nevada counters that it will be prejudiced if the
11 Tribes are allowed to intervene because the Tribes knew or should have known that their
12 interests were not being adequately represented months before they filed the Intervention
13 Motion, the existing parties already spent substantial time briefing and arguing Plaintiffs’
14 motion for preliminary injunction, and allowing intervention will force the parties to
15 participate in additional rounds of briefing “when this case needs to move forward to
16 dispositive motions.”⁵ (ECF No. 51 at 8.) The Court again agrees with the Tribes.

17 While it is true that Lithium Nevada and the other parties will have to participate in
18 briefing at least some additional issues if the Court allows the Tribes to intervene, the
19 Court will mitigate this potential prejudice by requiring the Tribes to adhere to the same
20 case schedule the parties have already agreed to. Moreover, the Court already outlined
21 a potential briefing schedule on the Tribes’ potential motion for preliminary injunction that
22 will not drastically disrupt the case schedule. (ECF No. 47.) And in their reply in support
23 of their Intervention Motion, the Tribes state they agree to be bound by the existing case
24 schedule. (ECF No. 54 at 3.) It is also notable that only Lithium Nevada argues prejudice,
25 whereas the other parties who have participated in the same briefing and agreed to the
26 same case schedule do not oppose intervention. Moreover, as described above with

27 _____
28 ⁵This quoted statement appears to reflect nothing more than an understandable
preference on Lithium Nevada’s part.

1 respect to the stage of the proceedings, this case remains in its early stages. When the
 2 Court considers all of this in light of the Ninth Circuit Court of Appeals' 'repeated
 3 instruction' that "the requirements for intervention are [to be] broadly interpreted in favor
 4 of intervention" *Smith*, 830 F.3d at 853 (citation omitted), the Court also finds that this
 5 prong weighs in favor of finding the Intervention Motion timely.

6 **c. Reason for and Length of the Delay**

7 The Tribes argue the delay between this case being filed and the Intervention
 8 Motion is attributable to the Tribes not learning about the Project until February 2021, not
 9 learning about the plan for physical disturbance of the site as part of the Historic Property
 10 Treatment Plan ("HPTP") until April 2021, and not learning about the imminence of the
 11 HPTP until May 2021. (ECF No. 43 at 8-11.) The Tribes also argue they were trying to
 12 get information and obtain assurances from Federal Defendants for some time that further
 13 contributed to their delay in filing the Intervention Motion. (*Id.* at 9-11.) The Tribes further
 14 argue that the consultation period on the Project occurred while the COVID-19 pandemic
 15 was raging, primarily online though many Tribe members lack internet access, and
 16 required documents filed by Federal Defendants in approving the Project contradict each
 17 other, so it has been difficult for the Tribes to gather information sufficient to allow them
 18 to file their Intervention Motion until now. (*Id.*) Lithium Nevada counters that the Tribes
 19 should have been aware that their interests were not adequately protected months ago
 20 and offer no justifiable reason for their delay. (ECF No. 51 at 9-10.) While the Tribes have
 21 delayed, the Court nonetheless finds their arguments more persuasive on this prong as
 22 well.

23 "Although delay can strongly weigh against intervention, the mere lapse of time,
 24 without more, is not necessarily a bar to intervention." *Bank of New York Mellon v.*
 25 *Foreclosure Sales Servs., LLC*, Case No. 2:15-cv-02087-APG-GWF, 2017 WL 626360,
 26 at *4 (D. Nev. Feb. 15, 2017) (quoting *Alisal*, 370 F.3d at 921) (granting motion to
 27 intervene despite delay). The Court credits the Tribes' explanation that it was difficult for
 28 their members to gather information about the Project given the COVID-19 pandemic and

1 their members' lack of internet access, and the potentially contradictory statements
 2 Federal Defendants made in public documents regarding the Project. The Court finds less
 3 persuasive the Tribes' argument that they were attempting to correspond with Federal
 4 Defendants, because Ms. Rehberg's letter is dated July 12, and gives the Tribes an
 5 opportunity to engage in some consultation that the Tribes apparently did not take her up
 6 on. (ECF No. 43-6 at 2.) But the Tribes still filed their motion within two weeks of receiving
 7 that letter. (ECF No. 43.) And the Court again finds the Tribes' delay understandable given
 8 the COVID-19 pandemic and their members' lack of internet access. This prong is
 9 therefore either neutral, or slightly favors finding the Intervention Motion timely.

10 On balance, all three prongs of the timeliness analysis weigh at least slightly in
 11 favor of finding the Intervention Motion timely filed. The Court accordingly finds the
 12 Intervention Motion timely and moves on to the remaining intervention as of right factors.

13 **2. Factors 2 and 3: Significant Protectable Interest and Impairment** 14 **of That Interest**

15 "An applicant has a 'significant protectable interest' in an action if (1) it asserts an
 16 interest that is protected under some law, and (2) there is a 'relationship' between its
 17 legally protected interest and the plaintiff's claims." *Cal. ex rel. Lockyer v. United States*,
 18 450 F.3d 436, 441 (9th Cir. 2006) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th
 19 Cir. 1998)). "The 'interest' test is not a bright-line rule." *Alisal*, 370 F.3d at 919 (citations
 20 omitted). It is instead "primarily a practical guide to disposing of lawsuits by involving as
 21 many apparently concerned persons as is compatible with efficiency and due process[.]"
 22 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (citation
 23 omitted).

24 Lithium Nevada recognizes the importance of proper tribal consultation, and
 25 instead essentially incorporates by reference its timeliness arguments to argue the Tribes
 26 have not satisfied these factors. (ECF No. 51 at 10-11.) Lithium Nevada then moves on to
 27 merits arguments as to why Federal Defendants did not violate the National Historic
 28 Preservation Act ("NHPA") as the Tribes claim the Federal Defendants did in the proposed

1 complaint they attached to their Intervention Motion. (*Id.* at 11-17; see also ECF No. 43-
2 1.) Lithium Nevada finally argues that the Tribes' interest will not be impaired if they are
3 not allowed to intervene because Federal Defendants have offered to let the Tribes
4 participate in consultation regarding another permit required before the HPTP may move
5 forward. (*Id.* at 17-18.)

6 The Court finds it premature to address Lithium Nevada's arguments about the
7 merits of the Tribes' proposed claims. And when the Court disregards Lithium Nevada's
8 merits arguments, Lithium Nevada offers little argument to suggest the Tribes have not
9 shown a significantly protectable interest that would be impaired were they not permitted
10 to intervene in this case. For their part, the Tribes argue that they have significantly
11 protectable interests under the NHPA that are related to the claims in this case because
12 this case too seeks to block construction of the Project at least until Federal Defendants
13 comply with their statutory consultation obligations, and the Tribes' interests would be
14 harmed if Defendants are permitted to proceed with the HPTP. (ECF No. 43 at 11-14.)
15 Indeed, the Tribes argue, the HPTP contemplates digging up sacred sites containing the
16 remains of the Tribes' members' ancestors. (*Id.*)

17 The Court agrees with the Tribes that they have shown a significantly protectable
18 interest that would be impaired were they not allowed to intervene. If the Tribes are right,
19 and Federal Defendants did not properly consult them under the NHPA, they have a
20 significantly protectable interest in ensuring they are properly consulted before any of their
21 sacred sites are dug up and a lithium mine is built on land they consider sacred. Moreover,
22 if the Court does not allow the Tribes to intervene, Defendants may imminently proceed
23 with the HPTP, which could certainly impair the Tribes' protectable interests in not having
24 their sacred sites dug up before being properly consulted. The Court also finds persuasive
25 the Tribes' argument that the alternative consultation offered by Federal Defendants under
26 the 'ARPA' process is not a perfect substitute for the consultation rights they are entitled
27 to under the NHPA.

28 ///

Moreover, the Court effectively permitted the parties to move forward towards completing digging incident to the HPTP when it denied Plaintiffs' motion for preliminary injunction. (ECF No. 48.) The Tribes persuasively argue that the digging incident to this plan will cause them irreparable harm. (ECF Nos. 43, 43-1, 44-1.) And "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Berg*, 268 F.3d at 822 (quoting the Fed. R. Civ. P. 24 advisory committee's notes) (reversing the district court's decision denying motion for leave to intervene as of right and finding in pertinent part that the proposed intervenor's interests would be impaired if not permitted to intervene). In sum, these two factors favor permitting the Tribes to intervene as of right in this case.

3. Factor 4: Adequate Representation

Courts consider three factors when assessing whether a present party will adequately represent the interests of an applicant for intervention:

(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Arakaki, 324 F.3d at 1086. Moreover, "the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests 'may be' inadequate and that the burden of making this showing is minimal." *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983).

There is basically agreement on this factor. The Tribes argue that their interests are inadequately represented because Plaintiffs do not bring a claim under the NHPA, nor do they claim to represent the Tribes' interests. (ECF No. 43 at 14-16.) Indeed, Plaintiffs themselves argue that they do not adequately represent the Tribes' interests. (ECF No. 52 at 2.) And neither Federal Defendants, who do not oppose the Intervention Motion, nor Lithium Nevada, who does, address this factor in their responses to the Intervention Motion. The parties accordingly appear to agree that the Tribes' interests are not

adequately represented by the existing parties to this case. This factor thus also favors allowing intervention as of right.

In sum, all four factors weigh in favor of permitting the Tribes to intervene as of right. The Court will grant the Intervention Motion.

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Intervention Motion before the Court.

It is therefore ordered that proposed Plaintiff-Intervenors' motion to intervene (ECF No. 43) is granted.

It is further ordered that proposed Plaintiff-Intervenors are admitted into this case as Plaintiff-Intervenors, with full rights of participation limited to the claims asserted in their proposed complaint (ECF No. 43-1).

It is further ordered that Plaintiff-Intervenors are bound by the existing case schedule that the Court approved and discussed at the recent hearing. (See ECF No. 47.)

DATED THIS 28th Day of July 2021.



MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE